Office-Supreme Court, U.S.
FILED
AUG 6 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2131

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Appellee,

CITY OF SALINAS,
Real Party in Interest.

On Appeal From the Supreme Court of the State of California

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM FILED BY REAL PARTY IN INTEREST CITY OF SALINAS

HAROLD S. LENTZ
Southern Pacific Building
One Market Plaza
San Francisco, Calif. 94105
Telephone: (415) 541-1781
Attorney for Appellant

BOWNE-PERNAU WALSH • 180 NINTH ST. • S.F., CA 94103 • (415) 864-2500

TABLE OF CONTENTS

Page

Foreword 1

I

The City's assertions concerning the weight to be given to the denial of review by the California Supreme Court are erroneous 2

II

The issue is not moot 3

III

The City's other contentions fail to establish a basis for dismissal of the appeal 5

A. The City's contentions concerning interpretation of Section 1204 is erroneous 6

B. Section 1202.1 establishes the clear intent of the Legislature that a "right of entry" is a property right which can only be taken in a condemnation action 7

C. The contention that the railroad's right to damages have been protected, is erroneous 8

D. Sections 1736 and 1708, governing the manner in which the Commission may amend or modify decisions, makes no exception for alleged "minor" modifications 9

Conclusion 10

TABLE OF AUTHORITIES CITED

Case

Page

Consumers Lobby Against Monopolies v. Public Utilities Commission, 25 Cal. 3d 891 (1979) 2, 3

Rules

20 California Administrative Code 15, (Public Utilities Commission Rules of Practice and Procedure, Rule 15) 3, 10

21 California Administrative Code, Subchapter 13:

Section 1552 4

Section 1554(b) 4

United States Supreme Court Rules, Rule 16.5 2

Statutes

California Government Code:

Section 815.2 9

Section 820.2 9

Section 820.6 9

California Public Utilities Code:

Section 1202 ..... 6, 7

Section 1202.1 ..... 6, 7, 8

Section 1204 ..... 6, 7, 8

Section 1207 8

Section 1708 ..... 9, 10

Section 1736 ..... 9, 10

No. 80-2131

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a corporation,
Appellant,

VS.

THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Appellee,

CITY OF SALINAS,
Real Party in Interest.

On Appeal From the Supreme Court of the State of California

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM FILED BY REAL PARTY IN INTEREST CITY OF SALINAS

Appellant, Southern Pacific Transportation Company, files this brief in opposition to the Motion to Dismiss or Affirm of the Real Party in Interest (sometimes hereinafter referred to as "the City"), dated July 10, 1981 (but not served by mail until July 16, 1981).

FOREWORD

In view of the page limitation imposed by Rule 16.5 of the Court's Rules, it will not be possible for appellant to provide detailed responses to all of the assertions and arguments in the motion of the City. However, some of the

City's contentions are approximately the same as presented in the Motion to Dismiss or Affirm filed by the appellee and have been responded to in appellant's Brief in Opposition to the motion of the Commission. Other contentions have already been covered in the Jurisdictional Statement and any detailed response herein would be largely repetitious. Therefore, to the extent possible, appellant will simply rely upon references to the Jurisdictional Statement and its Brief in Opposition to the motion of the Commission in responding to contentions set forth in the Motion to Dismiss or Affirm filed by the City of Salinas.

I

THE CITY'S ASSERTIONS CONCERNING THE WEIGHT TO BE GIVEN TO THE DENIAL OF REVIEW BY THE CALIFORNIA SUPREME COURT ARE ERRONEOUS

At pages 2-3, 4-5, and 6-8, the City presents contentions which seem to be substantially the same as the principal argument of the Commission in its Motion to Dismiss or Affirm. Like the Commission, the City contends (p. 5) that the "message" in the denial of review by the California Supreme Court amounts to a holding that the Commission acted "in compliance with apposite state statutes and regulatory law." The quoted wording is identical to that which appears in the Commission's motion (Cal. Motion, p. 5).[1] Such an argument is clearly untenable in view of the California Supreme Court's recent decision in *Consumers Lobby Against Monopolies v. Public Utilities Commission,*

---

[1]References to the Motion to Affirm or Dismiss filed by the California Public Utilities Commission of the State of California herein, shall be abbreviated as "Cal. Motion", followed by a page citation. References to the Motion to Affirm or Dismiss filed by the City of Salinas herein, shall be abbreviated as "City Motion", followed by a page citation.

25 Cal. 3d 891 (1979), in which it went out of its way to warn that it would be "sheer speculation" for litigants to try and determine what the reasoning of the California court was when it has denied review without hearing (p. 905). This subject has been fully covered in Sections IA and II (pp. 3-4, 5-7) of the Brief of Appellant in Opposition to Motion to Dismiss or Affirm filed by the Commission and the Court is respectfully referred thereto.

II

THE ISSUE IS NOT MOOT

At pages 3-4, the City contends that the issue of the Commission's granting a right of entry is moot by reason of the fact that, *subsequent* to the issuance of the Commission's amended order, it has obtained a judgment of condemnation in the regular courts. This contention was anticipated and the reason why the issue is not moot is basically set forth in footnotes 6 and 8 of the Jurisdictional Statement (pp. 3-5), to which the Court is respectfully referred.

If the obtaining of a subsequent judgment of condemnation in the regular courts could or did make the issue moot, there was no need for the City to implore the Commission to amend its decision to include an additional order granting a right of entry, which was relief that had not previously been specifically requested as required by Rule 15 of the Commission's Rules. Also, its subsequent vigorous opposition to the railroad's petitions for rehearing by the Commission and for writ of review in the California Supreme Court, as well as its opposition to the present appeal, would be pointless. Its vigorous objections only serve to emphasize that the matter is *not* moot because, without the issuance of a retroactive order by the Commisison granting the City an interest in the railroad's real property, as apparently admitted by the City, the project could

not proceed regardless of whether or not it subsequently obtained a judgment of condemnation in the regular courts.

The simple fact is that the City failed to act in a timely manner and, as a result, failed to provide the California Department of Transportation with evidence of a right of entry prior to April 1, 1980, as required by longstanding regulations of the California Department of Transportation (21 Cal. Adm. Code, Subchapter 13, Sections 1554(b) and 1552) and, as a result, CalTrans denied the City a $5,000,000 allocation from the State's Grade Separation Fund. The City, when imploring the Commission to help it overcome its mistake by issuing a retroactive condemnation order, made it clear that without the $5,000,000 allocation the project would not proceed so that no property interest or monetary contribution would be obtained from the railroad. That is obviously why the City, in support of its request for a modification of the Commission's decision, "nuc pro tunc", to include a specific order awarding the City a right of entry upon the real property of the railroad (which the Commission did without hearing or an opportunity to present evidence), advised the Commission that it was making the request because:

> ". . . at stake is a potential $5,000,000 in funding from the California Grade Separation Fund, *plus* an additional amount of approximately $729,000 representing SP's anticipated contribution under the order." (Emphasis added).

It was only because the Commission did amend its order on a retroactive basis that the California Department of Transportation reversed its position. This was specifically acknowledged in a declaration by the attorney for the Department of Transportation, filed in the Superior Court of the State of California in the County of San Francisco, No. 76711. Moreover, in that declaration the CalTrans at-

torney further indicated that the California Department of Transportation will reverse its position in the event that the Commission's decision is reversed or annulled on review or appeal, i.e. the City will lose its $5,000,000 allocation and, according to the representation it made to the Commission in seeking a retroactive order granting it a right of entry, it would appear that the entire project would not proceed so that appellant will not have to spend approximately three quarters of a million dollars on the City's project and no easement or rights of entry would be exercised. For the information of the Court, the declaration of the Attorney for the California Department of Transportation which has been refered to, is reproduced in the attached Appendix as Appendix G.[2]

In summary, the fact that the City obtained a subsequent judgment of condemnation could not make the issue moot for the simple reason that the subsequent judgment of condemnation was not a retroactive order. Therefore, it cannot serve to satisfy the requirements of the regulations of the California Department of Transportation for purposes of obtaining an allocation from the Grade Separaton Fund. In other words, whether the project proceeds appears to be entirely dependent upon the validity of the Commission's retroactive order. Therefore, the question of the validity of that order is not moot.

III

THE CITY'S OTHER CONTENTIONS FAIL TO ESTABLISH A BASIS FOR DISMISSAL OF THE APPEAL

The remainder of the City's motion (pp. 8-22) basically contends that the Commission's orders were valid and that, if they were invalid, appellant has not been harmed. It is

[2]For purposes of identification and paging, the attached Appendix has been treated as if it were an amendment or addition to the Appendix attached to the Jurisdictional Statement.

submitted that, in general, these contentions are not responsive to the Jurisdictional Statement, are self-contradictory and are erroneous. While the inadequacy of the arguments appearing at pages 8-22 of the City's motion are generally apparent, either on their face or from a reading of the Jurisdictional Statement, some of the contentions call for additional comment.

A. The City's Contentions concerning interpretation of Section 1204 are erroneous

A major portion of the City's motion consists of an attempt to establish the validity of the Commission's interpretation of Section 1204 of the California Public Utilities Code. In this regard, it begins with a proposition with which appellant fully agrees (City Motion, page 9):

> "Section 1204 of the Code must be read in light of the evident legislative intent set forth in Chapter 6, Part 1, Division 1 of the Public Utilities Code (Sections 1201 to 1220)."

The problem with the City's argument is that the City has failed to do precisely what is says "must" be done, i.e. read Section 1204 in the light of other statutes in the chapter of which it is a part. The most important failure in this regard is the City's failure to recognize that Section 1202.1 is one of those statutes which must be read in conjunction with Section 1204 in order to ascertain its meaning.

In general, appellant believes that most of the arguments of the City concerning interpretation of Section 1204 are adequately covered in the Jurisdictional Statement, to which the Court is respectfully referred. However, at least one erroneous assertion of the City should be pointed out. At page 12, the City asserts that it is "only in Section 1202, generally, and in Section 1204, specifically, that any reference is made to a right of entry". That assertion is incorrect. There is no reference to a right of entry, either gen-

erally or specifically, in Section 1202. While Section 1204 does provide that the Commission can authorize officers of a political subdivision "to enter upon" a right of way, it is in Section 1202.1, which the Commission and the City both desperately seek to ignore, that a "right of entry to permit the applicant to proceed with the work to be performed", is specifically mentioned.

B. Section 1202.1 establishes the clear intent of the Legislature that a "right of entry" is a property right which can only be taken in a condemnation action

At pages 14-17, the City professes not to comprehend the reasons for appellant's references to Section 1202.1. The first basis it offers for its lack of comprehension is the fact that Section 1202.1 was not brought into play and is not specifically applicable in this proceeding. However, all that appellant has done is follow the same principle that the City advocates on page 9 of its motion, to wit:

> "Section 1204 of the Code *must* be read in light of legislative intent set forth in Chapter 6, Part 1, Division 1 of the Public Utilities Code (Sections 1201-1220)" (Emphasis added).

This includes Section 1201.1, which becomes particularly important when it is remembered that Section 1201.1 is a much more recent statute than Section 1204, it specifically uses the phrase "right of entry to permit the applicant to proceed with the work to be performed" and it provides that such a "right of entry" can only be obtained in a "condemnation action". Since, as the City itself contends, Section 1204 must be read in the light of other statutes in Chapter 6, it would appear that there is no basis for contending that the authorization "to enter upon" railroad property referred to in Section 1204 is intended to be something different from the "right of entry" referred to Section 1202.1. Thus, Section 1201.1 establishes, as a mat-

ter of clear legislative intent, that a right of entry is a property right which can only be taken in a condemnation action.

At page 15 of its motion, the City attempts to discount appellant's argument on the ground that appellant has not "advanced any contention that the Commission does not have the power to issue a right of entry." It is correct that appellant does not contend that the Commission does not have condemnation powers. It does. However, that supports rather than detracts from appellant's position. The problem in this instance is not that the Commission lacks the power it has asserted. The problem is simply that it has exercised that power improperly and in a manner that is not consistent with either statutory or constitutional due process requirements. A right of entry has clearly been established by the legislature as being a property right which can only be granted in a condemnation action. While the Commission has been given condemnation powers, the City never requested it to exercise those powers nor did the Commission institute a condemnation action on its own motion and make it a part of the proceeding as specifically required by Section 1207 of the Public Utilities Code.

C. The Contention That The Railroad's Right To Damages Has Been Protected, Is Erroneous

At pages 17-19, the City attempts to contend that appellant has not been harmed in any event because the Commission has "declared" that appellant can file a petition for damages. The problem with this line of argument is that the damage to appellant has been caused by the Commission by issuance of a retroactive order which contravenes statutory and due process requirements. In other words, it is the Commission which should obviously be the party from whom damages would have to be sought. However, the Commission, as a state agency, is immune from suit.

California Government Code, §§ 815.2, 820.2 and 820.6. Thus, the appellant cannot be made whole by any alleged right to seek damages. The harm to appellant is irreparable in the absence of a decision by this Court on appeal.

D. Sections 1736 and 1708, Governing The Manner In Which The Commission May Amend Or Modify Decisions, Makes No Exception For Alleged "Minor" Modifications

At pages 19-22, the City deals with the failure of the Commission to comply with the requirements of Sections 1708 and 1736, which prescribe when and how the Commission may amend or modify its orders. The most interesting aspect of the City's argument is that it does *not* contend that the Commission complied with either section. Instead, it purports to offer excuses for the Commission's failure to comply with those procedural requirements.

Its first alleged excuse is that Decision No. 91891 did not add anything to the original decision. That simply is not true. A specific ordering paragraph was added:

> "Pursuant to Public Utilities Code Section 1204, the City of Salinas is authorized to enter upon so much of the right of way of SP as is necessary to effect the physical grade separation."

It was on the basis of this retroactive order that the California Department of Transportation reversed its previous denial of a $5,000,000 allocation, without which the project could not proceed and the entire proceeding would indeed have been moot. Under such circumstances, it is submitted that it is completely unreasonable to assert that nothing of substance was added to the original decision.

At pages 20-22, the City contends that appellant's arguments should be disregarded because appellant makes no attempt "to differentiate between a minor modification" and other modifications (City's Motion, p. 22). The trouble

with this contention is that Sections 1708 and 1736 themselves do not make such a differentiation. They apply to *all* amendments and modifications. Nor can it reasonably be contended that the Commission's Rules of Practice and Procedure somehow control or change an interpretation of the statutory provisions. If the Commission's Rules of Practice and Procedure were so overwhelmingly important, the Commission should never have issued its alleged modification at all since the City never complied with Rule 15 (20 Cal. Adm. Code 15), which requires that "all applications shall state clearly and concisely the authorization or relief sought; . . . ." and the City did not, as part of its application, request an order granting a right of entry. However, it is submitted that it is not the Commission's rules that control when and how an amendment or modification may be made. That has been provided for by statute. Specifically, Sections 1708 and 1736 of the Public Utilities Code. Those sections do not provide any exception for a so-called "minor" modification and the City has not even contended that those sections were complied with. It has simply contended that they *do not need* to be complied with. It is submitted that such a contention is patently erroneous.

CONCLUSION

It is submitted that the City has failed to provide any reasonable basis for a dismissal of the appeal. Therefore, applicant respectfully submits that the Motion to Dismiss or Affirm should be denied.

Dated: August 4, 1981
San Francisco, California.

Respectfully submitted,
HAROLD S. LENTZ,
Attorney for Appellant

(Appendix follows)

Appendix G

Richard G. Rypinski, Chief Counsel
John B. Matheny, Assistant Chief Counsel
O. J. Solander, Eugene C. Bonnstetter
Attorneys for Department of Transportation
1120 N Street, P.O. Box 1438
Sacramento, California 95807
Telephone: (916) 445-8512
Attorneys for Defendants

Superior Court of the State of California
In and For the City and County of San Francisco

No. 767711

Southern Pacific Transportation Company,
Plaintiff,
v.
California Transportation Commission, Department of Transportation of the State of California and Adriana Gianturco, Director of Department of Transportation,
Defendants.

Declaration of Eugene C. Bonnstetter in opposition to complaint for injunction.

I, Eugene C. Bonnstetter, do hereby declare and say as follows:

1. I am an attorney, licensed to practice law in the State of California, and have been practicing law since 1971.

2. I have been employed by the State of California, Department of Transportation, Legal Division since 1971.

3. I am the attorney asigned to review and approve allocations from grade separation funds for the Depart-

ment of Transportation (hereinafter referred to as the department).

4. I have been associated with the grade separation program since 1977.

5. On April 30, 1980, per my instruction Mr. H. Frank Hiyama on behalf of the department notified the City of Salinas (hereinafter referred to as city) that its application for funds must be denied.

6. On June 3, 1980, the Public Utilities Commission (hereinafter referred to as commission) issued decision No. 91891 denying Southern Pacific Transportation Company's (hereinafter referred to as S.P.) application for rehearing and granted the city's application for modification of decision No. 91469.

7. Based on the commission's decision No. 91891 the department reviewed the city's application filed March 24, 1980, and determined that the city had complied with all the provisions of section 1550 et seq. of Title 21 of the California Administrative Code.

8. On June 4, 1980, I as the attorney for the department advised the city and S.P. that the city's application of March 24, 1980, was in total compliance and that the department intended to make an allocation of $5,000,000 from the 1979-80 Grade Separation Fund to the city on or before June 10, 1980.

9. As of June 10, 1980, the entire Grade Separation Fund for the 1979-80 fiscal year has been allocated.

10. The department's allocation to the city for the Davis Road grade separation project encumbered the funds for the 1979-80 fiscal year; this avoided said funds from reverting to the General Fund on June 30, 1980, by operation of law. In addition, these funds have been included in the 1980-81 proposed State Budget Bill for reappropriation

for expenditure by the department in the 1980-81 fiscal year. Therefore, if this budget item is not deleted from the proposed State Budget Bill, and I have no reason to believe that it will, then the funds will be available for reallocation during the 1980-81 fiscal year, if a court of competent jurisdiction determines that the city is not entitled to the currently allocated funds. Then the funds could be reallocated to the next eligible applicant on the 1979-80 priority list, which is the Hollywood Way project in the City of Burbank.

11. On June 11 and 12, 1980, I notified, Ann F. Hasse and Harold S. Lentz, attorneys for S.P. by telephone of the action of the department, regarding the allocation to the city and its subsequent effect on the Grade Separation Fund, which is set forth in detail in paragraph 10 of this declaration.

12. It was further explained to the attorneys for S.P., Ann Hasse and Harold S. Lentz, that I cannot bind the Legislature, and if for whatever reason reappropriation of the Grade Separation Fund is deleted from the State Budget Bill then the city would be the only applicant who could receive the funds. However, it is my best information and belief that the funds will not be deleted from the State Budget Bill.

I declare under penalty of prejury that the foregoing is true and correct.

Executed this 13th day of June 1980, at Sacramento, California.

/s/ Eugene C. Bonnstetter
Eugene C. Bonnstetter
Declarant